

Journal of Civil Rights and Economic Development

Volume 5
Issue 2 *Volume 5, 1990, Issue 2*

Article 1

March 1990

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Available at: <https://scholarship.law.stjohns.edu/jcred/vol5/iss2/1>

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CURRENT ISSUES

WILL THE EMPIRE STATE STRIKE BACK AT COMMERCIAL POLLUTERS? A PROPOSAL FOR A TRANSACTION-TRIGGERED HAZARDOUS WASTE CLEANUP STATUTE IN NEW YORK

Over the past two decades, environmental policies have evolved into one of the leading concerns of the nation.¹ Federal environ-

¹ See *Recent Developments: In the Congress*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 10039 (Jan. 1990). Congressional awareness of environmental issues has been heightened; action must follow:

Every year the number of environmental bills introduced into the Congress of the United States increases. The United States and the world are becoming aware of the politics of our environment and what the failure to act may mean. Serious attempts have recently been made to change our policy from being reactive as the political need arises, to being proactive in order to project our existence into the long term future. The first session of the 101st Congress was part reactive and part proactive. The second session of the 101st Congress will help set the environmental tone for the 1990s and beyond.

Id. at 10041. See generally Reitz, *Environmental Policy — It Is Time For A New Beginning*, 14 COLUM. J. ENVTL. L. 111, 120-21 (1989) (advocates comprehensive environmental policy); Current Developments, *Mitchell Calls Bush's Clean Air Bill Weak, Says Potential Gains Offset By Backward Steps*, 20 Env't Rep. (BNA) 590, 590-91 (July 1989) (criticizes President's Clean Air Act); Dowd, *Who's Environment Czar, EPA's Chief or Sununu*, N.Y. Times, Feb.

mental regulation expanded in the early 1970's with the establishment of the Environmental Protection Agency (EPA)² and the promulgation of several environmental statutes.³ Although these were progressive attempts to ameliorate environmental deterioration, a major criticism of federal environmental legislation was,

15, 1990, at A1, col. 1 ("As the nation's defense recedes as an overriding issue . . . the environment becomes a more important one for Republican[s]."); N.Y. Times, Jan. 15, 1990, at A13, col. 1 (failure to clean up waste sites embarrassment to EPA); Sancton, *What On Earth Are We Doing*, TIME, Jan. 2, 1989, at 26 (foreboding of worldwide environmental disasters prompted designation of endangered Earth as "Planet of the Year" for 1988). "Taking effective action to halt the massive injury to the earth's environment will require a mobilization of political will, international cooperation and sacrifice unknown except in wartime. Yet humanity is in a war right now, and it is not too Draconian to call it a war for survival." *Id.* at 30. See Magnuson, *A Problem That Cannot Be Buried: The Poisoning of America Continues*, TIME, Oct. 14, 1985, at 76, 77-78 (increased awareness of health risks posed by chemical contamination has led to demand for more effective governmental action).

² See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970), reprinted in, 42 U.S.C.A. § 4321 (West 1983). President Nixon ordered the establishment of an Environmental Protection Agency to consolidate federal environmentally related activities. *Id.* He stated in the message accompanying the reorganization order that:

Our national government today is not structured to make a coordinated attack on the pollutants which debase the air we breathe, the water we drink, and the land that grows our food. Indeed, the present governmental structure for dealing with environmental pollution often defies effective and concerted action.

.....
This consolidation of pollution control authorities would help assure that we do not create new environmental problems in the process of controlling existing ones.

.....
Because environmental protection cuts across so many jurisdictions, and because arresting environmental deterioration is of great importance to the quality of life in our country and the world . . . a strong, independent agency is needed.

Id. See also *Boston v. Volpe*, 464 F.2d 254, 257 (1st Cir. 1972) (purpose of Act is to consider environmental consequences at earliest stage); *Chelsea Neighborhood Ass'n v. United States Postal Serv.*, 389 F. Supp. 1171, 1182 (S.D.N.Y. 1975) (purpose of Act is to consider and examine consequences before effects are irreversible). See generally Reitz, *supra* note 1, at 115 (evolution of federal environmental programs discussed); Commoner, *Failure of the Environmental Effort*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 10195, 10195-99 (June 1988) (discussion of original goals of EPA and of failure in having not yet met them); Shabecoff, *House Votes Bill to Elevate EPA to Cabinet Position*, N.Y. Times, March 29, 1990, at A1, col. 1 (American public's concern for environment results in most Representatives voting to elevate EPA to cabinet position despite massive reorganization problems).

³ See *infra* notes 16-25 and accompanying text (discussion of CERCLA); *infra* notes 8-14 and accompanying text (discussion of RCRA); Clean Air Act Amendments of 1970, 42 U.S.C. § 7401 (1982 & Supp. V 1983) (protects and enhances "quality of nation's air" through pollution control programs); Toxic Substances Control Act, 15 U.S.C. § 2601 (1982 & Supp. V 1983) (regulation of chemical substances and those who manufacture chemical substances that pose risk of injury to health or environment); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 (1982 & Supp. V 1983) (Congressional goal is to "restore and maintain chemical physical and biological integrity of the Nation's waters").

and continues to be, its failure to effectively place liability on responsible parties.⁴ Consequently, some states have focused their hazardous waste legislation on real estate transactions in an attempt to better address environmental cleanup liability.⁵ The most prominent and controversial example of this emphasis on real estate transactions is the transaction-triggered cleanup statute.⁶

New York has yet to enact aggressive real estate transfer-triggered hazardous waste legislation, although several proposals have been submitted to the legislature.⁷ The purpose of this Note is to propose a practical statute for New York. First, this Note will critique federal environmental statutes mandating the cleanup of

⁴ See Wagner, *Liability for Hazardous Waste Cleanup: An Examination of New Jersey's Approach*, 13 HARV. ENVTL. L. REV. 245, 248-49 (1989).

Our justice system is based on the notion that guilty parties should be prosecuted and deterred, while innocent parties should be protected and compensated. Overlaying this notion on CERCLA leads to frustration and discomfort with the underlying language. The legislation, even following the passage of SARA, places the burden for investigating sources of contamination on an innocent purchaser, and in some cases still holds these innocent owners of contaminated land financially responsible for prior landowners' wrongs.

Id. See also Bush, *George Bush on the Environment*, 18 ENVTL. L. REP. (ENVTL. L. INST.) 10293, 10294 (Aug. 1988) (as presidential candidate, he promised to enforce environmental laws by "putting the responsibility for cleanup where it belongs, on those who caused the problem in the first place"); Note, *Liabilities of the Innocent Current Owner of Toxic Property Under CERCLA*, 23 U. RICH. L. REV. 403, 408 (1989) (liability based on ownership can be unfair to parties who unwittingly find themselves responsible for enormous cleanup costs).

⁵ See, e.g., CAL. HEALTH & SAFETY CODE § 25359.7 (Deering Supp. 1990) (Hazardous Substance Account Act) (notification requirements in nonresidential property transfer); CONN. GEN. STAT. § 22a-134 (1990) (Transfer Act) (safety and notification regulations for property transfers); HAW. REV. STAT. § 343D (1985) (Environmental Disclosure Law) (full disclosure necessary for purchase of more than 5% of corporate assets); ILL. ANN. STAT. ch. 30 para. 901-02 (Smith-Hurd Supp. 1990) (Responsible Property Transfer Act of 1988) (notice to purchaser of past use and status); IND. CODE ANN. § 13-7-22.5 (Burns Supp. 1990) (Responsible Property Transfer Law) (30 day disclosure before transfer - penalty imposed for failure); IOWA CODE ANN. § 455B.430 (West Supp. 1990) (Environmental Quality Act) (full disclosure and subject to director approval before transfer); MINN. STAT. ANN. § 115B.16 (West 1987) (Environmental Response and Liability Act) (no use of land after closure of disposal facility); MO. ANN. STAT. § 260.465 (Vernon 1990) (Solid Waste Law) (notification required prior to transfer of site); N.J. STAT. ANN. § 13:1K-6-14 (West Supp. 1990) (Environmental Cleanup Responsibility Act) (inspection required at closing or sale).

⁶ See *infra* notes 65-84 and accompanying text (discussion of transaction-triggered notification statutes).

⁷ See *infra* notes 85-102 and accompanying text (discussion of New York's proposals to date). See generally Privitera, *Where's POPA? It is Time to Enact New York's Property Owners Protection Act*, N.Y. ST. B.J. (July 1990) 33, 34 ("[i]n order to protect new buyers of commercial property and to further the State's efforts toward the cleanup of toxic dumps within its borders, the Legislature is urged to pass the bill this term") [hereinafter *Where's POPA?*].

real property. Second, this Note will compare state statutes imposing various remediation requirements triggered by transfers of real property. Finally, this Note will recommend an ideal transfer-triggered cleanup statute for the state of New York.

I. FEDERAL REGULATIONS

A. *Resource Conservation & Recovery Act of 1976*

In 1965 Congress enacted the Solid Waste Disposal Act,⁸ which was later amended by the Resource Conservation & Recovery Act of 1976 (RCRA).⁹ The purpose of RCRA was to establish a "cradle to grave" tracking system that regulated the generation, handling and disposal of hazardous waste.¹⁰ Although RCRA is regulatory in nature, section 7003¹¹ imposes liability for cleanup on the landowner if the EPA determines that the hazardous condition is an "imminent and substantial endangerment."¹² Another

⁸ Solid Waste Disposal Act, 42 U.S.C. § 6901 (1982 & Supp. V 1983).

⁹ Resource Conservation & Recovery Act of 1976, 42 U.S.C. § 6901 (1982 & Supp. V 1987) [hereinafter RCRA].

¹⁰ See *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1070 (D. Colo. 1985) ("RCRA provides for the promulgation of regulations by the Environmental Protection Agency applicable to generators of hazardous waste, transporters of hazardous waste and owners and operators of hazardous waste treatment, storage and disposal facilities"); H.R. REP. NO. 96-1016, 96th Cong., 2d Sess., reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120 (RCRA is "prospective cradle-to-grave regulatory regime" for hazardous waste); Anderson, *Will the Meek Even Want the Earth?*, 38 MERCER L. REV. 535, 552 (1987) (RCRA imposes strict requirements which are principally prospective in nature).

¹¹ See RCRA § 7003(a), 42 U.S.C. § 6973(a) (1982 & Supp. V 1987) which provides in pertinent part:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person . . . who has contributed or who is contributing to such handling, storage, treatment, transportation, or disposal . . . to order such person to take such other action as may be necessary

Id. See also *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127, 1136 (D. Conn. 1980) (Act focuses on prevention of danger to health and environment).

¹² See, e.g., *United States v. Price*, 523 F. Supp. 1055, 1073 (D.N.J. 1981) (RCRA applied to successor landowner who did not investigate landfill which was substantial endangerment), *aff'd*, 688 F.2d 204 (3rd Cir. 1982); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870, 885 (E.D. Ark. 1980) (even minute leakage of hazardous substance is imminent and substantial danger to health and environment). See also Bleicher & Stonelake, *Caveat Emptor: The Impact of Superfund and Related Laws on Real Estate Transactions*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10017, 10019 (Jan. 1984) ("government relies most heavily on the

provision of RCRA, section 3013(a), allows the EPA to compel past or present owners of the site to analyze, monitor, and test the site and report these findings to the Agency.¹³

B. Comprehensive Environmental Response Compensation and Liability Act of 1980

In response to both RCRA's inability to effectively handle active hazardous sites¹⁴ and the public concern generated by the environmental catastrophe at Love Canal,¹⁵ Congress, in 1980, en-

imminent hazard provision of RCRA . . . to hold landowners liable for hazardous waste pollution").

¹³ RCRA § 3013(a), 42 U.S.C. § 6934(a) (1982 & Supp. V 1983). Section 3013(a) provides in pertinent part:

If the Administrator determines, upon receipt of any information, that (1) the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, or disposed of, or (2) the release of any such waste from such facility or site may present a substantial hazard to human health or the environment, he may issue an order requiring the owner or operator of such facility or site to conduct such monitoring, testing, analysis, and reporting with respect to such facility or site as the Administrator deems reasonable to ascertain the nature and extent of such hazard.

Id. See also *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164 (4th Cir. 1984) (RCRA applied to past hazardous site since leaking is construed to be "occurrence included in the meaning of disposal in the statute").

¹⁴ See *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1252 (S.D. Ill. 1984) ("CERCLA was enacted because Congress realized there were serious gaps in RCRA"); H.R. Rep. No. 96-1016, 96th Cong., 2d Sess., reprinted in, 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120 (while previous legislation was regulatory, CERCLA will impose strict liability; its purpose is to pursue appropriate response to inactive hazardous sites); Levitas & Hughes, *Hazardous Waste Issues in Real Estate Transactions*, 38 MERCER L. REV. 581, 591 (1987) (fundamental purpose of RCRA is regulation of sites while fundamental purpose of CERCLA is cleanup of sites; Congress intended their effect to be cumulative); Comment, *Hidden Hazards of Hazardous Waste Cleanup Laws: Lenders and Title Insurers Beware*, 18 CUMB. L. REV. 723, 725 (1988) (Congress passed CERCLA when it recognized that RCRA did not cover abandoned sites).

¹⁵ See M. BROWN, *LAYING WASTE: THE POISONING OF AMERICA BY TOXIC CHEMICALS*, at 289-301 (1979) (discussion of inadequacy of EPA in addressing problem of toxic waste in wake of Love Canal). During the 1940's, Hooker Chemicals Corporation, a manufacturer of pesticides, plasticizers and caustic sodas, dumped 20,000 tons of waste into the canal. *Id.* at 5. In 1953, Hooker deeded the property to the Niagara Board of Education for one dollar: "At that time the company issued no detailed warnings about the chemicals; a brief paragraph in the quitclaim document disclaimed company liability for any injuries or deaths that might occur at the site." *Id.* at 8. A school and playground were ultimately constructed on the site. *Id.* at 10. In 1978, levels of contamination were so high that the area was deemed a "great and imminent peril to the health of the general public." *Id.* at 27. See also *Current Developments, Carter Orders Temporary Relocation of 710 Families from Love Canal Area*, 11 Env't Rep. (BNA) 139, 140 (May 1980) (Love Canal only hazardous waste site to be declared national emergency). Regarding liability, Hooker maintained:

acted the Comprehensive Environmental Response Compensation And Liability Act (CERCLA or Superfund), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA).¹⁶

CERCLA broadly defines the class of persons to be held strictly liable for remediation costs.¹⁷ Only after cleanup is complete can

it 'does not own and has not owned the Love Canal site for 27 years.' The company said in 1953, after it sold the site to the Niagara Falls School Board, it lost control. It said although it warned the school board of the chemicals buried on the site, the board and the City of Niagara Falls disturbed the clay over the site causing the chemicals to leak into adjacent properties.

Id. at 140.

The Love Canal incident emphasized the need for more federally sponsored environmental protection. *See* Current Developments, *Extra Funds Sought for Love Canal; EPA Opposes Consulting Service Cut*, 11 Env't Rep. (BNA) 948, 948 (Oct. 1980) (President Carter asks Congress for \$3.86 million to aid in Love Canal disaster). *See also* United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 556 (W.D.N.Y. 1988) (recent Love Canal victims challenge CERCLA's innocent landowner defense); Glass, *The Modern Snake in the Grass: An Examination of Real Estate and Commercial Liability Under Superfund & SARA and Suggested Guidelines for the Practitioner*, 14 B.C. ENVTL. AFF. L. REV. 381, 381-86 (1987) (discussion of Love Canal's prompting of CERCLA).

¹⁶ Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 (1982 & Supp. V 1983) [hereinafter CERCLA]. *See* Note, *supra* note 4, at 403 (CERCLA enacted by Congress after many last minute compromises); Comment, *Private Response-Cost Recovery Actions Under CERCLA*, 34 U. KAN. L. REV. 109, 110 (1985) (CERCLA is Congress' attempt to fill gaps left from previous enactment of RCRA).

¹⁷ *See* CERCLA § 107, 42 U.S.C. § 9607(a) (1982 & Supp. V 1983). Persons responsible for cleanup under CERCLA include:

(1) the owner and operator of a vessel . . . or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who . . . arranged for disposal or treatment, of hazardous substances . . . (4) any person who . . . accepted any hazardous substances for transport to disposal or treatment . . .

Id.

Courts have broadly defined "persons" liable under CERCLA. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 168 (4th Cir. 1988) (absentee "site-owners" held liable), *cert. denied*, 109 S. Ct. 3156 (1989); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1571 (5th Cir. 1988) (real estate developer held liable); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986) (shareholder/corporate officer held liable), *cert. denied*, 484 U.S. 848 (1987); United States v. Price, 688 F.2d 204, 208-10 (3d Cir. 1982) (successor landowner held liable); Colorado v. Idarado Mining Co., 707 F. Supp. 1227, 1230 (D. Colo. 1987) (subsidiary company held liable for parent company contamination); Sunnen Prod. Co. v. Chemtech Indus., Inc., 658 F. Supp. 276, 277-78 (E.D. Mo. 1987) (present owner held liable although chemicals matched those handled and stored by previous owner); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579-80 (D. Md. 1986) (lender of foreclosed "facility" held liable); United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2128 (D.S.C. 1984) (company having title for one hour held liable); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1105 (D. Minn. 1982) (successor landowners held jointly liable).

The statute does not expressly state that persons will be held strictly liable, but courts

individuals attempt to recoup their costs from other potential parties, known under the statute as potentially responsible persons (PRPs).¹⁸ Defenses to the cleanup requirements of CERCLA are limited to acts of God, acts of war and acts or omissions of contractually unrelated third parties.¹⁹ CERCLA and RCRA cleanup

have held as such. *See* CERCLA § 101, 42 U.S.C. § 9601(32) (1982 & Supp. V 1983) ("liability" under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of title 33 [Federal Water Pollution Control Act]). *See also* *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (legislative intent supports strict liability standard); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983) (same).

¹⁸ CERCLA § 107, 42 U.S.C. § 9607(a)(4) (1982 & Supp. V 1983) provides, in relevant part, that persons covered under the Act "shall be liable for — (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the National Contingency Plan; (B) any other necessary costs of response incurred by any other person consistent with the National Contingency Plan" *Id.*

The extent of liability for the cleanup costs to a landowner remains unclear because the statute does not explicitly define necessary "costs of response." *See* *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1429 (S.D. Ohio 1984) ("response costs" is nowhere defined in the Act). To prove damages, plaintiff must prove (1) the damages are "necessary costs of response" and (2) the costs incurred are "consistent with the National Contingency Plan (NCP)." *Id.*

Some courts use the EPA's National Priority List (NPL) as a litmus test in deciding whether a cost is recoverable. *Compare* *Bulk Distribution Centers, Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1453-54 (S.D. Fla. 1984) (listing on NPL necessary to be consistent with NCP) *with* *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1046 (2d Cir. 1985) (listing on NPL not required to be consistent with NCP).

Other courts have held that "costs of response" are recoverable simply if they are consistent with the broad goals of the NCP, making prior government approval of the cleanup plan unnecessary. *See, e.g.,* *Cadillac Fairview/Cal. Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694-95 (9th Cir. 1988) (costs of response recoverable prior to specific government approval); *International Clinical Lab v. Stevens*, 710 F. Supp. 466, 472 (E.D.N.Y. 1989) (court affirmatively disavows requirement of prior governmental approval). *See generally* Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 *ECOLOGICAL L.Q.* 181, 183 (1986) (EPA publishes NCP which identifies requirements for proper cleanup; however, doubts still remain regarding future of cleanup efforts).

The type of costs recoverable under CERCLA have varied. *See, e.g.,* *Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643, 651 (3d Cir. 1988) (recovery costs of future monitoring of hazardous substance recoverable when caused by release or threat of release from site); *Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986) (same); *Pennsylvania Urban Dev. Corp. v. Golen*, 708 F. Supp. 669, 671 (E.D. Pa. 1989) (investigation costs recoverable); *Coburn v. Sun Chem. Corp.*, 19 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20256, 20257 (E.D. Pa. 1988) (costs of future monitoring of medical condition and water quality recoverable to residential property owner). *But see, e.g.,* *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1212 (6th Cir. 1988) (property loss not recoverable); *Shore Realty Inc.*, 759 F.2d at 1049 (injunctive relief not available); *Lykins v. Westinghouse Elec. Corp.*, 18 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 21498, 21500 (E.D. Ky. 1988) (relocation costs not recoverable), *reconsidered*, 710 F. Supp. 1122 (E.D. Ky. 1988); *Wehner v. Syntex Corp.*, 18 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20469, 20470 (N.D. Cal. 1987) (same).

¹⁹ CERCLA § 107(b), 42 U.S.C. § 9607(b) (1983 & Supp. 1989). *See* *Wagner Seed Co. v.*

costs potentially impact all transactions involving real property.²⁰ As can be expected, their effect on real estate transactions is generally manifested in a reduced sales price of contaminated property.²¹ As a result of this adverse effect on real property, indemnification clauses in sales contracts are becoming more prevalent.²² In addition, the threat of cleanup costs has prompted buyers to conduct extensive investigations of property conditions prior to purchase.²³

These factors indicate that CERCLA and RCRA have caused a heightened awareness among buyers and sellers of the possibility that hazardous substances may exist on their property.²⁴ Nevertheless, despite the gains these statutes have made toward cleaning up hazardous sites and promoting awareness within the real estate community, CERCLA and RCRA fall short in one critical respect: they do not necessarily place the burden of cleanup on the actual polluter.²⁵ Even in instances in which the actual polluter is forced

Daggett, 800 F.2d 310, 315 (2d Cir. 1986) (attempted use of act of God defense when fire led to toxic spill; no review on merits); *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (heavy rains not act of God). *See generally* Note, *supra* note 4, at 407 (discusses difficulty in proving "contractually unrelated" for statutory defense).

²⁰ *See* Comment, *The Environmental Due Diligence Defense and Contractual Protection Devices*, 49 LA. L. REV. 1405, 1417 (1989) (any purchaser of immovable property must be prepared to have third party defense available because he is current owner and liable under CERCLA); Note, *Landowner Liability Under CERCLA: Is Innocence a Defense?*, 4 ST. JOHN'S J. LEGAL COMMENTARY 149, 179 (1988) (real estate transactions affected by CERCLA and potentially extensive cleanup costs).

²¹ *See* Gaba, *supra* note 18, at 219 (relevant issue under § 107(a)(4)(B) action is price of land; market will adjust price accordingly); Glass, *supra* note 15, at 438 (reduced purchase price evidences buyer's acknowledgment of hazard).

²² *See, e.g.,* *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1462 (9th Cir. 1986) (indemnification clause in purchase agreement effects warranty of property but does not effect CERCLA section 107 claims). *See also* Gaba, *supra* note 18, at 219 (prospective buyer will protect himself by including indemnification for future cleanup in his contract for sale of real estate); Glass, *supra* note 15, at 441 (indemnification clause has no effect on government's ability to sue seller, or on buyer's use of CERCLA defense).

²³ *See* Levitas & Hughes, *supra* note 14, at 583 (risk of liability for cleanup encourages a careful examination of environmental conditions prior to purchase).

²⁴ *See generally* Hayes & Dinkins, *Environmental Liability in Real Property Transactions*, 23 U. RICH. L. REV. 349, 349 (1989) ("Federal and state environmental statutes now create potential liability for parties to a variety of seemingly innocent transactions."); Zimmerman, *Environmental Issues in Sales Transactions: The Seller's Perspective*, 3 NAT. RESOURCES & ENV'T 7, 8 (1988) (current environmental statutes and future laws must be contemplated in real estate transaction).

²⁵ *See supra* note 4 and accompanying text (CERCLA places liability on current owner, who must then recover his losses from actual polluter in common law contribution cause of action).

to remediate the site, expedient cleanup cannot be ensured because bureaucratic delays are the inevitable result of government agency supervision of remediation measures. Alternatively, it is suggested that an individual state transaction-triggered cleanup statute is a more effective means of ensuring the proper allocation of cleanup responsibility. State statutes that place the responsibility for compliance on prospective buyers and sellers and that are triggered by a transfer of or transaction in real property are likely to be a more efficient means of regulating the cleanup of commercial property.²⁶

II. STATE REGULATION

A. *Conditional Cleanup Statutes*

The generic term "conditional cleanup statute" can be used to describe certain statutes that prohibit a seller from transferring property that is not "clean."²⁷ Under these statutes, unless the state certifies that the property is free of hazardous substances or that adequate measures will be taken to remove such substances, the property may not be transferred.

1. *New Jersey*

New Jersey was the first state to enact an aggressive conditional cleanup law, the Environmental Cleanup Responsibility Act (ECRA).²⁸ This law requires the cleanup of certain commercial or industrial properties as a precondition to closure of the business or transfer of the property.²⁹ ECRA applies to defined "industrial

²⁶ See *infra* notes 65-84 and accompanying text (discussion of cleanup regulation in transaction-triggered notification statutes).

²⁷ See, e.g., CONN. GEN. STAT. § 22a-134(5) (1990) (cleanup certification necessary from state); N.J. STAT. ANN. § 13:1K-9b(2) (West Supp. 1990) (cleanup plan must be submitted to state Department of Environmental Protection prior to transfer).

²⁸ N.J. STAT. ANN. § 13:1K-6-14 (West Supp. 1990).

²⁹ *Id.* § 13:1K-11(a) (West Supp. 1990). The New Jersey legislature justified its enactment of ECRA by declaring:

[T]he generation, handling, storage and disposal of hazardous substances and wastes pose an inherent danger of exposing the citizens, property and natural resources of this State to substantial risk of harm or degradation; that the closing of operations and the transfer of real property utilized for the generation, handling, storage and disposal of hazardous substances and wastes should be conducted in a rational and orderly way, so as to mitigate potential risks; and that it is necessary to impose a

establishments''³⁰ and is triggered by the closing, termination, or transfer of operations.³¹ Once ECRA is triggered, the owner or

precondition on any closure or transfer of these operations by requiring the adequate preparation and implementation of acceptable cleanup procedures therefor.

Id. See generally *Superior Air Prod. Co. v. NL Indus., Inc.*, 216 N.J. Super. 46, 64, 522 A.2d 1025, 1035 (N.J. Super. Ct. App. Div. 1987) (ECRA part of statutory scheme with respect to remediation of contaminated commercial properties).

³⁰ N.J. STAT. ANN. § 13:1K-9 (West Supp. 1990). An "industrial establishment" is defined as: "[A]ny place of business engaged in operations which involve the generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or wastes on-site, above or below ground . . ." *Id.* § 13:1K-8(f). The statute classifies these establishments according to Standard Industrial Classification numbers designated by the Office of Management & Budget in the Executive Office of the President of the United States. *Id.*

³¹ *Id.* § 13:1K-9(a),(b) (West Supp. 1990). Events that trigger ECRA include: cessation of all operations which involve hazardous waste; any transaction whereby an industrial establishment becomes nonoperational for health or safety reasons; and any transaction whereby an industrial establishment undergoes changes in ownership. *Id.* § 13:1K-8(b). See, e.g., *In re Fabritex Mills, Inc.*, 231 N.J. Super. 224, 231, 555 A.2d 649, 653 (N.J. Super. Ct. App. Div. 1989) (cessation of operation interpreted to mean ceasing substantially all operations).

The statute defines transfer of ownership as "including but not limited to a sale of stock in the form of statutory merger or consolidation, sale of the controlling share of the assets, the conveyance of the real property, dissolution of corporate identity, financial reorganization and the initiation of bankruptcy proceedings." N.J. STAT. ANN. § 13:1K-8(b) (West Supp. 1990).

The statute was designed to cover a wide range of triggering events. See, e.g., *New Jersey Dep't of Envtl. Protection v. J.T. Baker Co.*, 234 N.J. Super. 234, 238, 560 A.2d 739, 740-41 (N.J. Super. Ct. Ch. Div. 1989) (potential merger would trigger ECRA); *In re Robert L. Mitchell Technical Center*, 223 N.J. Super. 166, 173, 538 A.2d 410, 412 (N.J. Super. Ct. App. Div.) (if basis of company's activity is hazardous waste, merger of small research division triggers ECRA), *cert. denied*, 111 N.J. 605, 546 A.2d 526 (1988); *In re Vulcan Materials Co.*, 225 N.J. Super. 212, 220, 542 A.2d 25, 28-29 (N.J. Super. Ct. App. Div. 1988) (closure of prior owner's landfill triggers ECRA). See also Farer, *Transaction Triggered ECRA: The New Wave in Cleanup Law*, NAT'L L.J., Feb. 27, 1989 at 24 (transaction need not occur in New Jersey to trigger ECRA).

Arguably, the applicability of ECRA in the bankruptcy context is conditioned upon the actual sale of property. See *In re Borne Chem. Co. Inc.*, 54 Bankr. 126 (D.N.J. 1984). In *Borne*, Borne Chemical Company (Borne), in the process of liquidation and reorganization sought approval of the proposed sale of two parcels of real estate. *Id.* at 128. New Jersey's DEP objected to the proposal and threatened to void the transaction unless ECRA requirements were satisfied. *Id.* Borne petitioned the court for an order declaring, *inter alia*, that it could close its agreement without complying with ECRA and that the DEP could not void the sale. *Id.* The court rejected Borne's argument that ECRA was preempted by the Bankruptcy Code. *Id.* at 130. The Bankruptcy Code does not state explicitly that it supercedes all state law, nor is it so comprehensive that it entirely displaces state regulations. *Id.* Furthermore, the court reasoned that the purposes of ECRA and of the Bankruptcy Code are "not even remotely related." *Id.* at 131. Despite the costs that ECRA compliance would impose upon Borne, and which would diminish funds available for distribution to creditors, the court refused to conclude that ECRA conflicted with the Code. *Id.* at 131-32. Notwithstanding this determination, the court, on reconsideration, allowed Borne to abandon one parcel in compliance with ECRA and to cease operations on the other without complying with ECRA. *Id.* at 134-35.

operator must submit to the New Jersey Department of Environmental Protection (NJDEP) either a negative declaration,³² which warrants that there are no hazardous substances on the site, or a proposed cleanup plan with financial security guaranteeing its implementation.³³ The NJDEP must approve the negative declaration or the proposed cleanup plan³⁴ and ultimately must certify that the premises have been detoxified.³⁵

The penalties for failing to comply with ECRA are severe.³⁶ If the statute is violated, the sale or transfer may be voided by the transferee, and the owner or operator of the property may be deemed strictly liable for cleanup costs and subjected to a \$25,000 per day civil penalty.³⁷

However, the lower court case upon which the court based its decision was subsequently overruled. See *In re Quanta Resources Corp.*, 55 Bankr. 696 (D.N.J. 1983), *rev'd*, 739 F.2d 927 (3d Cir. 1984), *aff'd sub nom.* Midatlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 507 (1986) (Supreme Court held that trustee in bankruptcy could not abandon property in contravention of state statute or regulation reasonably designed to protect public health or safety). See also Note, *The Environmental Cleanup Responsibility Act (ECRA): New Accountability for Industrial Landowners in New Jersey*, 8 SETON HALL LEG. J. 331, 349-358 (1985) (ECRA designed to protect public health, therefore, *Borne* abandonment should not be tolerated).

³² N.J. STAT. ANN. § 13:1K-8(g) (West Supp. 1990). A "negative declaration" is a "written declaration, submitted by an industrial establishment and approved by the [NJDEP], that there has been no discharge of hazardous wastes on the site, or that any such discharge has been cleaned up in accordance with procedures approved by the department, and there remain no hazardous substances or wastes at the site of the industrial establishment." *Id.* at § 13:1K-8(g). Note, however, that a prospective buyer has no standing to challenge a NJDEP letter of ECRA nonapplicability. See *In re 970 Realty Assoc.*, 234 N.J. Super. 348, 351, 560 A.2d 1259, 1260 (N.J. Super. Ct. App. Div. 1989) (court did not allow challenge to NJDEP's declaration letter by buyer); *Chemos Corp. v. NJDEP*, 237 N.J. Super. 359, 367, 568 A.2d 75, 79 (N.J. Super. Ct. App. Div. 1989) (*per curiam*) (revocation of negative declaration by NJDEP did not prejudice plaintiff when necessary submissions by plaintiff were missing).

³³ N.J. STAT. ANN. § 13:1K-9 (West Supp. 1990). The financial security consists of a "surety bond or other financial security for approval by the department guaranteeing performance of the cleanup in an amount equal to the cost estimate for the cleanup plan." *Id.* at § 13:1K-9(b)(3).

³⁴ *Id.* at § 13:1K-10. The department must approve the negative declaration or "inform the industrial establishment that a cleanup plan shall be submitted" within 45 days of submission. *Id.* at § 13:1K-10(b).

³⁵ *Id.* at § 13:1K-10(c). According to the schedule contained in the approved cleanup plan, the department shall "inspect the premises to determine conformance with the minimum standards for soil, groundwater and surface water quality and shall certify that the cleanup plan has been executed and that the site has been detoxified." *Id.*

³⁶ See *id.* at § 13:1K-13 (liability of transferor).

³⁷ *Id.* See also *Dixon Venture v. Crucible*, 235 N.J. Super. 105, 111, 561 A.2d 663, 666 (N.J. Super. App. Div. 1989) (ECRA also allows transferee to sue transferor for damages rather than void conveyance).

ECRA-type statutes have been introduced in several other states; however, attempts at enactment have been unsuccessful.³⁸ Several theories have been advanced to explain the reluctance of other states to adopt an ECRA-type statute.³⁹ First, some states recognize that certain provisions of CERCLA overlap ECRA, and view ECRA as potentially needless legislation. For example, ECRA provides an innocent purchaser a defense to cleanup responsibility that was not previously available before SARA; but now CERCLA, as amended by SARA, also allows this defense.⁴⁰ Second, some states have chosen not to follow New Jersey's lead because of the understaffing problems that have hindered the implementation of ECRA⁴¹ and have created a substantial backlog in processing applications.⁴² Third, ECRA has been faulted for its vague terminology, especially with regard to the types of transactions that

³⁸ See Farer, *Transaction-Triggered Environmental Laws and State Super Liens: Latest Developments on the New Wave*, reprinted in *The Impact of Environmental Law in Real Estate and Other Commercial Transactions*, ALI-ABA Course Study Materials, at 47-57 (Sept. 1989) [hereinafter *Latest Developments*] (States proposing ECRA-type laws include California (1985-86); Delaware (1988); Maryland (1986); Massachusetts (1987); Michigan (1989); New Hampshire (1986); New York (1989); Pennsylvania (1985)).

³⁹ See Schmidt, *New Jersey's Experience Implementing the Environmental Cleanup Responsibility Act*, 38 RUTGERS L. REV. 729, 739-752 (1986) (discussion of general problems of ECRA, such as understaffing and SIC code applications); Comment, *New Jersey's Environmental Cleanup Responsibility Act: An Innovative Approach to Environmental Regulation*, 90 DICK. L. REV. 159, 186-195 (1985) (discussion of both correct and erroneous interpretations of ECRA).

⁴⁰ See *supra* note 19 and accompanying text (discussion of SARA's innocent owner defenses).

⁴¹ See Olson, *ECRA: New Jersey's Cleanup Statute*, 17 ENVTL. L. REP. (ENVTL. L. INST.) 10395, 10396 (1987). In addition to size, Olson stated that lack of experience among the staff has also been problematic: "The constant change in staff and the varied levels of training that staff members receive means that the extent and intensity of ECRA review varies considerably among the various case managers This contributes to the almost consistent exasperation with which ECRA is viewed by the business community." *Id.* But see Miller, *New Jersey's Improved ECRA Implementation: The State Answers Its Critics*, 18 ENVTL. L. REP. (ENVTL. L. INST.) 10084, 10086 (1988). A spokesman for the NJDEP has acknowledged the administrative problems of ECRA, but countered criticism by asserting that:

Standard operating procedures are . . . being developed that will improve the consistency of decision making [I]t should be noted that the Department is not the only one that has hired inexperienced staff. Due to the expansion of this field many firms have either had to switch people from other disciplines or hire recent graduates with environmental degrees. Both the quality of our reviews and the consultant submissions require continued efforts at improvement.

Id.

⁴² See Olson, *supra* note 41, at 10396 (backlog of applications leads to delays in certification process).

trigger it⁴³ and its relationship to tax assessments.⁴⁴ Finally, ECRA has been criticized because cleanup quality standards have not been set⁴⁵ and, consequently, the NJDEP must review "negative declarations and cleanup plans on a case by case basis."⁴⁶

2. Connecticut

A different approach to environmental cleanup was taken by Connecticut in its Transfer Act.⁴⁷ The statute is triggered by the transfer of certain named establishments⁴⁸ or of any establishment generating more than 100 kilograms of hazardous waste per month or handling hazardous waste generated by another.⁴⁹ The Transfer Act does not require the submission of a proposed cleanup plan as a precondition to transfer.⁵⁰ Prior to transfer, the owner or operator must submit a negative declaration⁵¹ to the transferee and, shortly thereafter, to the Commissioner of Environmental Protection.⁵² If the transferor is unable to submit this declaration, he must certify to the commissioner that he will "con-

⁴³ See, e.g., Note, *EPA Regional Administrator in New York Says Environmental Policy in State of 'Gridlock'*, 17 Env't. Rep. (BNA) 1190, 1191 (1986) (critique of ECRA). See also *supra* note 31 and accompanying text (wide range of events may trigger ECRA).

⁴⁴ See, e.g., *Inmar Assoc., Inc. v. Carlstadt*, 112 N.J. 593, 603-09, 549 A.2d 38, 43-46 (1988) (tax assessment did not deduct costs spent by company to comply with ECRA). See also Kneen, *ECRA Tax Consequences*, 35 J. URB. & CONTEMP. LAW 283, 288-89 (1989) (critical discussion of *Inmar*). The reasoning in *Inmar* rests on a "patchwork of cases." *Id.* However, the cases have no relation to the *Inmar* facts and, as a result, the holding could have harmful effects on New Jersey's real estate market. *Id.*

⁴⁵ See Olson, *supra* note 41, at 10396. An additional criticism of ECRA is that it does not distinguish between seriously contaminated sites and sites which are "relatively innocuous." See Note, *Direct Governmental Review, Restriction and Prohibition of Private Sector Transactions and Property Transfers*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 10374, 10378 (1988) (panel discussion).

⁴⁶ N.J. STAT. ANN. § 13:1K-10(a) (West Supp. 1990).

⁴⁷ CONN. GEN. STAT. § 22a-134 (1990).

⁴⁸ CONN. GEN. STAT. § 22a-134(3) (1990). For example, "establishment" includes a dry cleaning or furniture stripping establishment, an auto body repair shop or a painting shop. CONN. GEN. STAT. § 22a-134(3)(B) (1990).

⁴⁹ CONN. GEN. STAT. § 22a-134(3)(A) (1990).

⁵⁰ CONN. GEN. STAT. § 22-134a (1990).

⁵¹ CONN. GEN. STAT. § 22a-134a(b) (1990). Unlike ECRA, the Transfer Act allows a negative declaration to be submitted even if hazardous waste remains on the property. CONN. GEN. STAT. § 22a-134(5)(2) (1990). The commissioner must determine that the substances pose no threat to human health or safety, and that they are being managed accordingly. CONN. GEN. STAT. § 22a-134(5)(1) (1990).

⁵² CONN. GEN. STAT. § 22a-134a(b) (1990). The owner or operator must submit a copy of the declaration to the commissioner within 15 days after the transfer. *Id.*

tain, remove or otherwise mitigate the effects . . . of hazardous waste"⁵³ The transferor's noncompliance⁵⁴ renders him strictly liable for all cleanup and removal costs,⁵⁵ exposes him to a civil penalty of up to \$100,000,⁵⁶ and entitles the transferee to recover money damages.⁵⁷

Seeking to avoid the administrative delays of enforcement experienced by New Jersey, the Connecticut legislature drafted the Transfer Act to allow for minimal state intervention.⁵⁸ Such drafting, however, considerably weakened the statute's impact.⁵⁹ Because an actual remediation plan need not be approved by the commissioner,⁶⁰ cleanup quality standards may vary and the transfer of polluted property may still occur. Furthermore, the Act does not permit rescission of the contract,⁶¹ arguably the strongest incentive for compliance.

B. Notification Statutes

Notification statutes, although inspired by New Jersey's ECRA, remove ECRA's requirement of site cleanup as a condition to transfer. Instead, notification statutes simply require that notice of the site's condition be given to the prospective transferee, and in some cases to the state environmental agency.⁶² It is submitted that since these statutes closely follow property law in that they

⁵³ CONN. GEN. STAT. § 22a-134a(c) (1990).

⁵⁴ CONN. GEN. STAT. § 22a-134d (1990). Noncompliance includes knowingly giving or causing to be given any false information. *Id.*

⁵⁵ CONN. GEN. STAT. § 22a-134b (1990).

⁵⁶ CONN. GEN. STAT. § 22a-134d (1990).

⁵⁷ CONN. GEN. STAT. § 22a-134(b) (1990).

⁵⁸ CONN. GEN. STAT. § 22a-134a(b) (1990). Government intervention is minimized because the owner need only submit a copy of the negative declaration within 15 days after transfer. *Id.*

⁵⁹ See *Latest Developments*, *supra* note 38, at 29 (impact of Connecticut statute weakened by legislature drafting for minimal state involvement); Farer, *supra* note 31, at 24 (in Connecticut there is "no state oversight and thus no agency-instigated delays").

⁶⁰ CONN. GEN. STAT. § 22a-134a(b) (1990). The commissioner's permissible involvement is vague, despite the statutory attempt to define his authority. *Id.* at § 22a-134c. See generally Dean, *How State Hazardous Waste Statutes Influence Real Estate Transactions*, 18 Env't Rep. (BNA) 933, 933-34 (1987) (comparison of Connecticut and New Jersey statutes regarding commissioner approval).

⁶¹ See CONN. GEN. STAT. § 22a-134b (1990) (remedies for noncompliance do not include rescission of the contract).

⁶² See *infra* notes 63, 65 and accompanying text (discussion of type of notification in deed notice and transaction-triggered notification statutes).

require the transferee to be given actual or constructive notice of the hazardous condition, notification statutes may be more acceptable to the real estate community than strict ECRA-type statutes which more directly interfere with property transfers.

1. *Deed Notice Statutes*

One type of notification statute, the deed notice statute, merely requires the disclosure of the hazardous condition to be recorded on the deed or lease.⁶³ Deed notice statutes simply provide the buyer with constructive notice of the property's condition. They do not afford the prospective buyer or government agency with any relief if hazardous substances are found to exist.⁶⁴

2. *Transaction-Triggered Notification Statutes*

In contrast to the deed statute, a transaction-triggered notification statute is more comprehensive. It requires notification of the existence of hazardous substances to be given to the purchaser or lessee at the time of the transfer, regardless of the recordation of any hazardous condition on the deed.⁶⁵ Although stronger than the deed notice statute, this type of statute is not as powerful as ECRA-type statutes because actual remediation is not mandatory.⁶⁶

⁶³ See, e.g., OR. REV. STAT. § 466.360(a) (1989) (example of deed notice statute); 35 PA. STAT. ANN. tit. 35, § 6018.405 (Purdon Supp. 1989) (same); WASH. REV. CODE ANN. § 70.105B (West Supp. 1989) (same); W. VA. CODE § 20-5E-20 (1986) (same).

⁶⁴ See, e.g., 35 PA. STAT. ANN. tit. 35 § 6018.405 (Purdon Supp. 1989) (acknowledgment of transferor's actual knowledge of hazardous waste disposal made part of deed); W. VA. CODE § 20-5E-20 (1989) (transferor's actual knowledge prior to or during his use of hazardous waste disposal is disclosed in deed or lease). See also Dean, *supra* note 60, at 934-35 (discusses purpose of notice requirement); Flannery & Poland, *Hazardous Waste Management Act - Closing the Circle*, 84 W. VA. L. REV. 347, 391-92 (1982) (problems with West Virginia statute include no disclosure at time of conveyance and no provision indicating consequence of failure to disclose).

⁶⁵ See, e.g., CAL. HEALTH & SAFETY CODE § 25359.7 (Deering Supp. 1990) (Hazardous Substance Account Act); HAW. REV. STAT. § 343D (1985) (Environmental Disclosure Law); ILL. REV. STAT. ch. 30, para. 901 (West Supp. 1990) (Responsible Property Transfer Act of 1988); IND. CODE ANN. § 13-7-22.5 (Burns Supp. 1990) (Responsible Property Transfer Law); IOWA CODE ANN. § 455B.430 (West Supp. 1990) (Environmental Quality Act); MINN. STAT. ANN. § 115B.16 (West 1987) (Environmental Response and Liability Act); MO. ANN. STAT. § 260.465 (Vernon 1990) (Solid Waste Law).

⁶⁶ See, e.g., Dean, *supra* note 60, at 934-35 (compared to ECRA-type statutes, notice statutes provide "less drastic approach" in protecting potential purchasers); Bart, *Liability of*

It is suggested that transaction-triggered notification statutes reveal a structure that can be broken down into five essential parts: 1) the subjected party; 2) the triggering transaction; 3) the information required; 4) the party to whom disclosure is made; and 5) the transferee's remedy.

Under most transaction-triggered notification statutes, owners or transferors of commercial property are generally required to comply with the notification requirements.⁶⁷ Only California's respective statute additionally requires lessees of nonresidential real property to comply.⁶⁸ This protects the property owner by providing him with actual knowledge of his tenant's use of hazardous substances and allows the owner to terminate the lease upon disclosure.⁶⁹

Statutory description of the types of transactions triggering the statute vary; typically disclosure is required upon the sale, lease or transfer of property.⁷⁰ Indiana's Act, for example, broadly defines the transactions that will trigger the statute; however, it expressly excludes conveyances of property interests such as easements, a

Innocent Landowner for Hazardous Waste - New Jersey, California, and Federal Legislation, 15 REAL EST. L.J. 260, 263-64 (1987) (comparison between New Jersey's ECRA statute and California's notice statute indicates greater burden on seller in New Jersey).

⁶⁷ See, e.g., CAL. HEALTH & SAFETY CODE § 25359.7(a) (Deering Supp. 1990) (statute applies to owners of "nonresidential property"); HAW. REV. STAT. § 343D-3 (1985) (statute applies to persons or corporations with 10% ownership of voting class securities in corporation); ILL. REV. STAT. ch. 30 para. 903 § 3(e) (West Supp. 1990) (statute applies to transferor of real property); IND. CODE ANN. § 13-7-22.5-9,-13 (Burns Supp. 1990) (defines transferor; transferor required to give notice); IOWA CODE ANN. § 455B.430(2) (West Supp. 1990) (statute applies to owners of abandoned and uncontrolled disposal sites); MINN. STAT. ANN. § 115B.16(2) (West 1987) (notification under statute applies only to owners); MO. ANN. STAT. § 260.465(2) (Vernon 1990) (statute applies to any seller, conveyor or transferor of abandoned and uncontrolled disposal site).

⁶⁸ CAL. HEALTH & SAFETY CODE § 25359.7(b) (Deering Supp. 1990) (statute applies to any lessee or renter who knows or has reasonable cause to believe that hazardous substances are located beneath real property).

⁶⁹ See Farer, *supra* note 31, at 24 (California's statute carries real "stinger" by allowing leasehold interest to be voidable at owner's discretion when tenant does not disclose); *Latest Developments*, *supra* note 38, at 47 (failure of tenant to provide requisite notice to landlord constitutes default under lease).

⁷⁰ See CAL. HEALTH & SAFETY CODE § 25359.7(a)(b) (Deering Supp. 1990) (triggered by sale, lease or rental of real property); ILL. REV. STAT. ch. 30, para. 903 § 3(g) (West Supp. 1990) (triggered by conveyance of property interest by deed, lease, assignment or mortgage); IND. CODE ANN. § 13-7-22.5-7 (Burns Supp. 1990) (same); IOWA CODE ANN. § 455B.430(2) (West Supp. 1990) (triggered by sale, conveyance or transfer of title); MO. ANN. STAT. § 260.465(2) (Vernon 1990) (triggered by sale, conveyance or transfer of title).

deed of partition or an inheritance or devise.⁷¹ Hawaii's Environmental Disclosure Act is unique because its triggering transaction is dependent upon the sale of corporate securities.⁷² Minnesota's respective statute is more difficult to trigger than most; disclosure is mandated only by the closure of a facility.⁷³ Upon reviewing the various transaction-triggered notification statutes, it seems clear that broadly defining "transaction" better serves the ultimate purpose of such statutes: cleaning up contaminated commercial property.

Some statutes require detailed disclosure regarding the hazardous waste condition.⁷⁴ Other statutes simply require a general description of the hazardous condition.⁷⁵ At first blush, complete disclosure to a prospective buyer may seem desirable; sellers, however, may be reluctant to comply for fear of revealing possible trade secrets.⁷⁶

Disclosure provides the prospective buyer with notice. California's Hazardous Substance Account Act is an example of a fully self-executing statute and requires disclosure only to the prospective buyer or lessee; the state cannot intervene to void the transaction.⁷⁷ Other self-executing statutes require notification to be

⁷¹ IND. CODE ANN. § 13-7-22.5-7(b)(1)-(14) (Burns Supp. 1990).

⁷² HAW. REV. STAT. § 343D-3 (1985) (statute triggered when owner of 10% or more of voting class securities purchases 5% of additional securities or assets in twelve month period).

⁷³ MINN. STAT. ANN. § 115B.16(1), (2) (West 1987).

⁷⁴ See, e.g., HAW. REV. STAT. § 343D-3 (1985) (disclosure includes: complete financial disclosure, history of prior environmental law compliance, future environmental actions required in next five years); ILL. REV. STAT. ch. 30, para. 905 (West Supp. 1990) (disclosure on six page document includes: description of operations that generated, manufactured, processed, transported, stored or handled hazardous waste; permit use; site plans; history of hazardous releases; history of prior ownership); IND. CODE ANN. § 13-7-22.5-15 (Burns Supp. 1990) (same); IOWA CODE ANN. § 455B.430(1) (West Supp. 1990) (disclosure includes only that disposal site on state's registry); MINN. STAT. ANN. § 115B.16(2)(a)-(c) (West 1987) (disclosure affidavit includes: statement asserting that land was used to dispose of hazardous waste or is contaminated by release of hazardous substance; identification, quantity, location, condition and circumstance of disposal; and property use restrictions); MO. ANN. STAT. § 260.465(2) (Vernon 1990) (disclosure includes: site on state registry; applicable use restrictions; all registry information; buyer's assumption of cleanup liability).

⁷⁵ CAL. HEALTH & SAFETY CODE § 25359.7(a) (Deering Supp. 1990) (written notice describing the hazardous condition to buyer is adequate).

⁷⁶ Cf. Note, *New Jersey's Environmental Cleanup Responsibility Act: An Innovative Approach To Environmental Regulation*, 90 DICK. L. REV. 159, 185-85 (1985) (individuals in competitive industries regard disclosure requirements of ECRA as possibly jeopardizing trade secrets).

⁷⁷ See CAL. HEALTH & SAFETY CODE § 25359.7(a), (b) (Deering Supp. 1990) (disclosure

given to the appropriate government agency, either before or after the conveyance;⁷⁸ however, some states additionally require disclosure to government agencies. Like New Jersey's ECRA, these statutes require disclosure to, and approval from, a government agency before the transaction can be consummated.⁷⁹

Statutes requiring government notification enable the respective government agency to more efficiently identify properties that are most in need of remediation. Although an agency under a government notification statute is not empowered to prevent a sale of polluted land, it can require the submission of a proposed cleanup plan which it has the power to enforce. The downside to this incentive for remediation is the potential adverse effect administrative involvement may have on commercial real estate transactions. At a minimum, transfers may take longer; at most, they may be discouraged.

Once disclosure of the existence of a regulated hazardous substance has been made, the various transaction-triggered notification statutes provide an assortment of remedies. For example, Illinois' and Indiana's Responsible Property Transfer Acts each provide a purchaser with the power to void the transaction.⁸⁰ California's Hazardous Substance Account Act goes one step further by providing a purchaser with the power to void the sale *and* to collect damages.⁸¹ Other statutes, such as Iowa's Environmental Quality Act and Missouri's Solid Waste Law provide the state en-

made from seller to buyer, or from lessee to owner or lessor).

⁷⁸ See, e.g., ILL. REV. STAT. ch. 30, para. 904, para. 906 (West Supp. 1990) (disclosure document given to transferee, if any, and to lender, if any, 30 days prior to transfer; disclosure document must also be given to office of recorder in county in which property is located and Illinois EPA within 30 days of transfer); IND. CODE ANN. § 13-7-22.5-10(a), -16(a) (Burns Supp. 1990) (same); MINN. STAT. ANN. § 115B.16(2) (West 1987) (disclosure made, prior to sale, to county recorder in county in which property located, in order to make it available in ordinary title search).

⁷⁹ See, e.g., HAW. REV. STAT. § 343D-3(1) (1985) (disclosure made to state agency, who must review disclosure statements and make determination of adequacy); IOWA CODE ANN. § 455B.430(2) (West Supp. 1990) (disclosure made prior to sale to director of state environmental agency, who must in turn approve owner's request for transfer).

⁸⁰ ILL. REV. STAT. ch. 30, para. 904, 907 (West Supp. 1990) (the parties can void transfer within 10 days, plus civil penalty of \$1000 per day may be imposed); IND. CODE ANN. § 13-7-22.5-12, -21 (Burns Supp. 1990) (party may void and bring civil action to recover consequential damages).

⁸¹ CAL. HEALTH & SAFETY CODE § 25359.7(a) (Deering Supp. 1990) (actual damages, civil penalty, and other remedies provided by law).

vironmental agency with a remedy, but afford none to the purchaser.⁸² Hawaii's Environmental Disclosure Law provides remedies to any person involved in the sale, including shareholders of a company that is the target of a takeover.⁸³ Finally, Minnesota's statute provides, *inter alia*, a remedy to the state agency by giving it the power to enforce the statutorily mandated disclosure.⁸⁴ It is submitted that while the remedy provision of notification statutes merely governs "adequate" compliance, harsh penalties, such as rescission of the contract, create a greater incentive for compliance and set transaction triggered notification apart from deed notice statutes.

III. NEW YORK

A. *Proposals*

Since 1986, legislation similar to ECRA has been repeatedly proposed in the New York State Legislature; however, each proposal has died in committee.⁸⁵ The 1989 proposal⁸⁶ required the

⁸² IOWA CODE ANN. § 455B.430(4) (West Supp. 1990) (injunctive relief available to director, plus civil penalty of \$1000 per day per violation may be imposed); MO. ANN. STAT. § 260.465(4) (Vernon 1990) (same).

⁸³ HAW. REV. STAT. § 343D-10 (1985) (person, shareholder, court, attorney general can each enjoin purchase; in addition civil penalties up to \$100,000 may be imposed).

⁸⁴ MINN. STAT. ANN. § 115B.16(2)(c), (4)(a), (4)(c) (West 1987) (does not effect or prevent transfer of ownership; county attorney or attorney general may bring action to impose or recover civil penalty up to \$100,000).

⁸⁵ See Attorney General's Program Bill (Property Owners' Protection Act) (1990); State of New York Legislative Digest, 212th Annual Legislative Session at A621 (1989); State of New York Legislative Digest, 211th Regular Session at A755 (1988); State of New York Legislative Digest, 210th Regular Session at A213-14 (1987); State of New York Legislative Digest, 209th Regular Session at A635-36 (1986).

Governor Cuomo initiated environmental cleanup legislation in his 1986 state of the State address. See N.Y. Gov. Ann. Mess. (1986), reprinted in [1986] N.Y. Legis. Ann. 64. (Governor proposed ECRA-type legislation). See also *New York Governor Cuomo to Propose Legislation to Require Cleanups When Property Is Sold*, 17 Env't Rep. (BNA) 1575, 1575 (1987) (reporting Governor Cuomo's support for ECRA-type bill).

⁸⁶ A. 8041, 212th Leg., Reg. Sess. (1989). This was a proposed amendment to Article 27 of the Environmental Conservation Law. *Id.* at 1. The accompanying statement in support of the amendment asserted that:

A fundamental principle of the proposed Environmental Cleanup Responsibility Act ("ECRA") is that those persons with knowledge of pollution must clean it up prior to any transfer of the property. ECRA fosters a private route to environmental quality and places the cleanup responsibility where it belongs. This bill would require, as a pre-condition of any transfer by owners of non-residential real property, either a formal certification that such property has not been the subject of any unauthorized

owner,⁸⁷ upon the transfer⁸⁸ of non-residential real property⁸⁹ to furnish either a certificate of public safety or a certificate of compliance to the transferee.⁹⁰ As defined by the proposals, a certificate of public safety would have warranted that the property had never been or was no longer subject to the release of any hazardous substance.⁹¹ Likewise, a certificate of compliance would have contained the transferor's guarantee to remedy the effect of any

release of hazardous substances or petroleum or that a compliance plan has been formulated. The costs of any necessary cleanup plans would be borne by the owner of the property . . . State agencies have supervised and approved dozens of cleanups which could have been avoided if the provisions contained in this bill were current law. Failure to contain environmental contamination may hasten its spread, requiring expenditure of public funds at some future date and posing a risk to human health and natural resources. ECRA is an important, proven and necessary piece of legislation which serves to further the environmental quality and economic viability of this State and to shift future public liability for environmental damage to private wrongdoers. Because of the immediate economic threat posed to the would-be polluter, this bill should help deter the environmentally dangerous release of hazardous substances.

Attorney General's Legislative Program, Revised Memorandum in Support of A.8041, at 2 (1989-90). See generally Scagnelli & Gold, *New York's Movement Toward an Environmental Cleanup Responsibility Act: Learning From the New Jersey Experience*, N.Y. ST. B.J. (Jan. 1990) 45, 48-49 (comparison and critique of two proposed ECRA bills).

⁸⁷ See A. 8041, 212th Leg., Reg. Sess. (1989). Proposed § 27-1605(7). Owner is defined as any person who has legal title to the property. *Id.* at § 27-1605(7) (proposal). "Person" includes "any individual, public or private corporation, political subdivision, government agency, municipality, copartnership, association, firm, trust or estate." *Id.* at § 27-1605(8) (proposal).

⁸⁸ *Id.* at § 27-1605(11) (proposal). "Transfer" is defined as "any transaction by which nonresidential real property undergoes a change of ownership . . ." *Id.* This is a substantial revision of the 1988 proposal which defined transfer as "every transaction by which any estate or interest in nonresidential real property is created, transferred, mortgaged or assigned, or by which the title to any real property may be affected . . ." See A. 11618, 211th Leg., Reg. Sess., at § 27-1605 (1988) (proposal).

⁸⁹ A. 8041, 212th Leg., Reg. Sess., at § 27-1605(6) (1989) (proposal). "Nonresidential real property" is defined as "any real property which, at the time of transfer, is not improved solely by one or more dwelling units and outbuildings consistent with residential use." *Id.* The previous year's proposal did not define this term; therefore, multi-unit apartment, cooperative and condominium units were potentially subject to the requirements of the bill. Cf. A. 11618, 211th Leg., Reg. Sess. (1988).

⁹⁰ See A. 8041, 212th Leg., Reg. Sess., at § 27-1607(1) (1989) (proposal).

⁹¹ A. 8041, 212th Leg., Reg. Sess., at § 27-1605(2) (1989) (proposal). A "certificate of public safety" is a sworn declaration stating either that there has been no release nor any threat of release of hazardous substances or petroleum on or at the property or that, if there has been contamination, that all remediation obligations required in the certificate of compliance have been met. *Id.* This certificate is similar to the negative declaration required under New Jersey's ECRA. Cf. N.J. STAT. ANN. § 13:1K-8(g) (West Supp. 1990) (negative declaration required).

release or threat of release of any hazardous substance.⁹² Proposed state involvement in the certification process was to be minimal.⁹³ The proposed penalty for noncompliance was to be a \$25,000 fine.⁹⁴ This proposal passed the Assembly but never progressed further than the Senate Rules Committee.⁹⁵

The most recent proposal, submitted in 1990 and entitled the Property Owners' Protection Act⁹⁶ (POPA), would have required the transferor⁹⁷ of commercial real property⁹⁸ to execute a declaration of due diligence prior to transfer.⁹⁹ This declaration would have warranted that the transferor investigate with due diligence the condition of the property, and, if necessary, undertake the remediation of any release of hazardous substances that had been

⁹² A. 8041, 212th Leg., Reg. Sess., at § 27-1605(3) (1989). A "certificate of compliance" essentially states that the owner will be responsible for remediation of the effects of contamination "in, on, at or migrating from the property" to be transferred. *Id.* (proposal).

⁹³ Compare A. 8041, 212th Leg., Reg. Sess., at § 27-1607 (1989) (proposal) (obligations upon transferor only) with proposed § 27-1611 (duties of commissioner imply state involvement). Unlike New Jersey's ECRA, this bill places primary responsibility on the owner. *See supra* note 35 and accompanying text (NJDEP must certify that the premises have been detoxified).

The owner is required to conduct "an inquiry and investigation into the current and previous ownership and uses of the property consistent with good commercial or customary standards." A. 8041, 212th Leg., Reg. Sess., at § 27-1607(2) (1989) (proposal). Although the commissioner is empowered to enter upon and inspect the property in question, this is not a precondition to certification. *See id.* at § 27-1611(2) (proposal).

⁹⁴ A. 8041, 212th Leg., Reg. Sess., at § 71-2729 (1989) (proposal). This is a significant departure from the 1988 proposal which imposed criminal sanctions as a penalty. *See* A. 11618, 211th Leg., Reg. Sess., at § 71-2705(2) (1988) (proposal). Under the 1989 proposal, rescission of the contract was not an option. *See* A. 8041, 212th Leg., Reg. Sess. (buyer can not rescind sale). *But see, e.g.,* N.J. STAT. ANN. § 13:1K-13(b) (West Supp. 1990) (buyer can void sale).

⁹⁵ *See* A8041 State of New York Legislative Digest, 212th Annual Legislative Session at A621 (1989) (progressed only to Senate Committee).

⁹⁶ Attorney General's Program Bill (Property Owners' Protection Act) (1990). *See generally* *Where's POPA?*, *supra* note 7, at 36-37 (POPA's disclosure requirements can effectively protect public health).

⁹⁷ *Id.* at § 27-1603(10) (proposal). It is defined as "the transfer or transfers of any interest in commercial real property by any method, including . . . sale, exchange, assignment, surrender, option, trust, indenture, conveyance upon liquidation or by a receiver or acquisition of a controlling interest in commercial real property." *Id.* The 1990 proposal's definition of "transfer" is more structured than it has been in past proposals. *See, e.g., supra* note 88 and accompanying text (discussion of 1989 proposal's definition of "transfer").

⁹⁸ Attorney General's Program Bill (POPA) (1990) § 27-1603(2) (proposal). "Commercial real property" is defined as "any real property which, at the time of transfer, is not improved solely by any dwelling units and outbuildings consistent with residential use." *Id.*

⁹⁹ *Id.* at § 27-1605 (proposal).

or had threatened to be discharged.¹⁰⁰ Like Connecticut's Transfer Act, POPA did not permit a buyer to rescind the contract. Thus, a strong incentive for compliance was left out.¹⁰¹ Like its predecessor, POPA never progressed further than the Assembly Rules Committee.¹⁰²

B. *The Ideal Statute*

This Note proposes an "ideal" statute for New York that is tempered by the reality of past legislative failures. Although the New York Legislature is reluctant to affirmatively enact a transaction-triggered cleanup statute, the annual proposals evidence their recognition of the need for such a statute to fill the gaps left by CERCLA, namely, by imposing cleanup liability on responsible parties.

To be most effective, owners, operators or transferors, as well as lessees of nonresidential real property should be subject to the provisions of the statutes.¹⁰³ This requirement would broaden the scope of POPA by incorporating California's inclusion of lessees in the definition of "subjected parties."

To properly address the need to target responsible parties, triggering events should be drafted broadly to include any transfer of non-residential property. Thus, "transfers" should be defined as any sale, lease, or closure of non-residential property, with limited exceptions for "passive" transfers, such as inheritances, tax deeds, deeds of partitions, easements and transfers by operation of law

¹⁰⁰ *Id.* at §27-1603(4) (proposal). The proposal permits the transferor and the transferee to expressly agree to allocate responsibility for remediation. *Id.* at §27-1603(4)(b)(ii) (proposal).

¹⁰¹ Telephone interview with John Privitera, Assistant Attorney General, Environmental Protection Bureau, New York State Attorney General's Office (March 22, 1990). The latest version of the New York Proposal does not include a provision for rescission for two reasons. *Id.* First, a rescission clause encourages buyer's reliance on the seller's disclosure and cuts back on the buyer's duty of diligence. *Id.* Second, if the government discovers hazardous substances on the site, and the buyer is allowed to rescind the sale, the government is forced to find the original seller to cleanup the site. *Id.* Typically, the original seller is not available, thereby leaving the cleanup and costs to the government. *Id.* Cf. *supra* notes 59-61 and accompanying text (discussion of weakness of Connecticut's Transfer Act).

¹⁰² Telephone interview with New York State Assembly Chambers (September 18, 1990).

¹⁰³ See *supra* notes 67-69 and accompanying text (discussion of subjected parties to other state statutes).

upon the death of a joint tenant. Clearly delineating the scope of a "transfer" will avoid the confusion caused by ECRA's vague terminology¹⁰⁴ and would better serve the purpose of alerting participants in non-residential real estate transactions to potential remediation responsibility.

The ideal statute should require disclosure of detailed information regarding operations that generate, manufacture, process, transport, store or handle hazardous substances.¹⁰⁵ In addition, all releases of hazardous substances by current and past owners should be disclosed. Full disclosure puts the parties at arm's length, making the transaction as fair as possible.

The statute should require disclosure to both the transferee and the New York Department of Environmental Conservation (DEC).¹⁰⁶ To better protect the interests of the innocent transferee, it is imperative that he receive actual notice of the transferor's disclosure rather than the mere constructive notice presumed under deed notice statutes.¹⁰⁷ Again, this is to assure that liability is placed on the responsible party. Disclosure to the DEC should be made within a reasonable time before the transfer of the property. Timely disclosure will better allow the agency to properly gauge the necessary response and to meet the need for the imposition of cleanup liability. In this respect, past New York proposals were weak because notification to the DEC was not mandated until after the transaction was consummated.¹⁰⁸

Finally, New York's transaction-triggered cleanup statute should provide transferors with sufficient incentive to comply; allowing the transferee to void the sale is such an incentive. This would effectively place liability on the responsible party once the

¹⁰⁴ See *supra* notes 43-44 and accompanying text (critical discussion of ECRA's vague terminology).

¹⁰⁵ See *supra* notes 74-76 and accompanying text (discussion of description requirements in various state transfer notification statutes).

¹⁰⁶ Cf. *supra* notes 91, 92, 100 and accompanying text (discussion of New York's prior proposals required different types of certification requirements).

¹⁰⁷ See *supra* notes 63-64 and accompanying text (discussion of construction notice given by deed notice statutes).

¹⁰⁸ See, e.g., Attorney General Program Bill (1990) (POPA) § 336-a (declarations of due diligence filed with county clerk within 72 hours of transfer); State of New York Legislative Digest, 212th Annual Legislative Session at A621 (1989) (certificate of compliance filed with Department within 72 hours of transfer).

undisclosed contamination has been discovered. No sale would be binding absent remediation by the owner of the property. To further strengthen the statute, the DEC should be afforded a remedy, such as the power to enforce an approved cleanup plan. Any agency induced delays would be countered by the owner's desire to consummate the sale.

CONCLUSION

Transaction-triggered cleanup statutes are an aggressive attempt by the states to address and resolve a stubborn environmental problem — effectively placing remediation liability on the polluting party. Notification statutes alert interested parties to the possible existence of hazardous conditions, yet because they contain no mandate of cleanup, they generally fall short of the mark. Conditional cleanup statutes, on the other hand, fill a void left by notification statutes by requiring remediation measures to be taken. Besides failing to adequately allocate cleanup responsibility, these statutes have failed to properly balance the necessary government involvement. As a result, statutes are either too weak, as in Connecticut, or overly restrictive, as in New Jersey. The New York State Legislature has had the opportunity to evaluate the strengths and weaknesses of other cleanup statutes. Given this beneficial insight, it seems clear that New York could most effectively achieve the goal of placing cleanup responsibility on the polluting party by passing a transaction-triggered notification statute. If enacted, such a statute would best serve the purposes of warning potential transferees of the existence of hazardous substances and would force transferors to clean their sites, thus achieving the goal of properly placing cleanup liability where it belongs: with the polluter.

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